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**TÍTULO:** El defecto como categoría interdisciplinaria y su valor en la investigación teórica y jurídica.

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**RESUMEN:** El documento discute el uso de la categoría "defecto" en varios campos del conocimiento científico. El autor ha demostrado que el término "defecto" se usa ampliamente en muchas ciencias: matemáticas, física, medicina, psicología, ingeniería, etc. La relevancia y la importancia práctica del estudio de los defectos en la jurisprudencia, en particular en el marco de lo general, la teoría del derecho está fundamentada. Se indica que en la actualidad este fenómeno ha sido estudiado fragmentariamente y falta su concepto legal teórico, lo que impide su efectiva investigación de rama.

**PALABRAS CLAVES:** Defecto, error, compensación, deficiencia, protección de derechos.

**TITLE:** Defect as an interdisciplinary category and its value in theoretical and legal research.

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**ABSTRACT:** The paper discusses the use of the category “defect” in various fields of scientific knowledge. The author has shown that the term "defect" is widely used in many sciences: mathematics, physics, medicine, psychology, engineering, etc. The relevance and practical significance of the study of defects in jurisprudence, in particular within the framework of the general theory of law, is substantiated. It is indicated that at present this phenomenon has been studied fragmentarily, its theoretical legal concept is missing, which prevents its effective branch research.

**KEY WORDS:** defect, error, compensation, deficiency, protection of rights.

## **INTRODUCTION.**

In the legal literature, the term “defect” is used in various phrases: defects of law, defects in law, legal (judicial) defects, defects in the system of law, defects in legislation, defects in law-making, defects in legal norms, defects in legal acts, defects in rules, defects in law regulation, defects in judicial acts, defects in legal documents, defects in legal facts, defects in legal awareness, defects in legal ideology, defects in legal socialization, etc. Also, in many legal scientific sources, there are terms synonymous to "defect" terms: shortcomings, drawbacks, faults, imperfections of law or rules, legislation, etc.

It seems that in modern conditions of legal knowledge development for further work with the conceptual apparatus, it is necessary to refer to the methodological bases and the origins of the formation of the applied scientific abstractions.

The term "defect" is widely used in many sciences. Among them are: mathematical (Ushakov V. N., Uspensky A. A., 2010, P. 99–128) and technical sciences (Voronin V. V., 2013, P. 825-833; Shalobanov S. V., 2005, P. 59-68), physics, psychology (Gaydukevich E. A., 2011, P. 331-336), medicine (Starchenko A. L., Fourkalyuk M. Yu., 2004, P. 77-87), and others. The technical

sciences have developed a whole theory of defects, the value of which only increases from year to year. This is confirmed by the following statement by representatives of this branch of scientific knowledge: "... the theory of defects, which is a fairly universal means of research in mechanics, physics and materials science, has been greatly developed in modern studies" (Belov P. A., Lurie S. A., 2007, P. 49).

In jurisprudence, however, the general theory of legal defects has not yet been created, and the existing separate publications only outline the contours of the problem. In the sectoral legal studies, the situation is somewhat better: in recent years many significant theses devoted to the issues of defects in certain branches of Russian law have been prepared.

However, taking into account the methodological significance of philosophy for all sciences, it is primarily of interest to take a philosophical approach to deficiency and defects. Philosophy, as one of the forms of social consciousness, is a philosophical foundation to other sciences; it predetermines and conditions the formation of scientific theories and develops general methods of knowledge in the study of objects from all subject areas.

The endless variety and complexity of the processes taking place in the world make inevitable defects. As figuratively noted by the modern Russian philosopher P. Gurevich, "it turns out that evolution is least of all similar to the smooth accumulation of beneficial inclinations. It is fussing about all over the place and sometimes offers insane solutions to urgent breakthrough processes. Particularly unlucky in this regard is a man" (*Gurevich P.*, 2015, P. 6–19). In such a situation, the shortcomings of phenomena become an obligatory result and even an attribute of evolution. But the matter is not only in objective evolutionary processes but also in the subjective component of the defective. The Latin expression "Errare humanum est" - "To err is human" is widely known. Any human activity is associated with errors, and the more complex is the activity, the more likely and more dangerous is the error.

## **DEVELOPMENT.**

### **Purpose.**

Analysis of defects in various fields of scientific knowledge, determining the need to study this category in the framework of the general theory of law to minimize negative legal consequences.

### **Methods.**

in the work, a general scientific dialectic approach to the cognition of defects was used, which allowed us to consider this phenomenon in its formation and development, as well as in conjunction with related phenomena; the methods of formal logic were used.

### **Content.**

The philosophical foundations of understanding defects are closely related to the understanding of quality. The quality management philosophy has played a great role in studying the nature of defects and the ability to resist them, P. Crosby, the author of the well-known work “Quality is free” (*Crosby P.*, 1979.), was one of the first to declare the need to strive for maximum quality in all areas of production through the creation of the “zero defects” (ZD) quality system committees (*Konareva L. A.*, 2011, P. 97–113; *Kulikov V. V.* 2017, P. 390–391) and the requirement of each employee to do the work qualitatively on the first try (“do it right first time”).

The basis of defect-free production are the following principles: priority to the system of preventing defects, and not their detection and correction; focusing management efforts on the issue of reducing the defectiveness of products, a deep understanding of consumer demand for defect-free products, the manufacturer's desire to deliver such products, the need for the executive bodies of enterprises to formulate areas of quality improvement for long periods; systematic and continuous monitoring of product quality. It is also important to understand the quality standard as the absence of defects (or zero defects) and the introduction of the price of nonconformity as a

quality meter, which represents the loss from non-performance of work qualitatively the first time.

F. Crosby also developed the program “14 steps to improve quality” (14 steps programme for quality improvement), which is now widely known in economics and practice.

These approaches to defects and quality can be quite applicable in the making of qualitative norms of law and regulations, which also represent the products obtained in the process of "lawmaking".

In medicine and psychology, the category “defect” also bears a significant heuristic functional load.

In the course of analyzing mental processes, scientists quite clearly distinguish between such concepts as “disease” and “defect”. A disease is defined as a pathological process that disrupts the normal functioning of the body, its relations with the environment, which, as a rule, as a consequence, is expressed in temporary or permanent disability or its decline. The term “defect” means a certain physical or mental disability, which entails a violation of the normal child development process in the form of its consequence (*Gaidukevich E. A.*, 2011, P. 331).

According to L. S. Vygotsky, in the course of understanding the defect phenomenon, it is necessary to take into account its systemic structure, which presupposes the presence of primary disorders, which are a direct consequence of the biological inferiority of the central nervous system, and a number of secondary disorders that result from the interaction of a child with a specific defect with society (*Vygotsky L. S.*, 2003, P. 203). L. S. Vygotsky’s merit in the psychological development of defects consists in substantiating the dialectical connection "defect-compensation": on the one hand, a defect impedes the activity of the organism, and on the other, other functions are being developed to compensate for the defect.

In our opinion, this link (defect-compensation) is generally ignored by legal science. In particular, legal scholars do not answer the questions: who, what and how compensates for a legal defect. At the same time, if in psychology such compensations are mostly positive (more sensitive hearing and touch in the blind), then defects in law lead to negative compensations, for example, gaps can

"facilitate" the commission of offences, the development of tax avoidance schemes, a decrease in legal awareness and cultures, etc., but defects can probably have positive consequences; for example, gaps can lead to successful self-regulation. In any case, the ways to compensate for legal defects in legal science have to be identified and systematized yet.

Analysis of the experience of using the considered category in medicine and psychology determines some conclusions of legal significance. As we see, the categories of "disease" and "defect" are quite distinguished; in jurisprudence, in our opinion, the concepts of "legal defect" and offence should be consistently distinguished. Moreover, if the theory of the offense received its proper development, the legal defectology has not yet been declared as an independent area of research in the scientific literature. In this regard, taking into account the positive results obtained by other sciences in operating the scientific construct "defect" seems to be very valuable for jurisprudence.

Of great importance in medical sciences is the understanding of the defect not only as a category adjacent to the disease but also as an indicator of the poor quality of medical care provided.

Such an approach to medical defects is justified, including the need to distinguish it from the concept of "medical error". In general, a defect in medical care is associated with actions (or inaction) of medical personnel that violate the mandatory requirements for the provision of medical care. Such defects are caused by non-observance of treatment standards, an improper adaptation of the patient's individual characteristics and his/her concomitant pathology to the treatment standard, non-compliance with all possible (under licensing requirements and conditions) diagnostic and treatment methods (*Voropaev A.V.*, 2008, P. 113). Among such defects, there are called: diagnostics defects, treatment defects, laboratory examination defects, medical record-keeping defects (*Makarova V. N., Akopov V. I.*, 2009, P. 96-99).

The main causes of defects in medical care are insufficient qualifications of medical workers, inattention to the patient, late treatment, and inadequate examination (*Marzi L.*, 2009, P. 163-167). Defects in medical care often lead to criminal, disciplinary and civil liability (*Beryllo M.S.*, 2014, P. 193–198; *Galyukova M. M.*, 2008, P. 32–35; *Getsmanova I. V., Vinogradov K. A.*, 2012, P. 102). It should be borne in mind that the legal concept of a defect in medical care is absent; in the doctrine it is understood to mean “inadequate medical care, which does not comply with the principles of medical care regulated by standards, medical care procedures, generally accepted protocols, guidelines, and modern scientific literature approaches to the diagnosis or treatment of certain diseases” (*Povzun S.A.*, 2017, P. 14-17).

Interestingly, that any defect of medical care itself can lead to various legal consequences that depend on whether the patient has been harmed or not. In the latter case, we are talking about the action or inaction of the doctor which contributed to the difficulty of providing medical care, led to the non-optimal use of medical resources, to the dissatisfaction of the patient from contacting medical organizations. Such differences in the consequences of defects determine the independent legal significance of two forensic examinations: the quality of medical care and the examination of defects in the provision of medical care (*Petrova T.N.*, 2016, P. 260-264). When a patient is harmed by a defect in medical care, in most cases legal liability arises, which depends both on the fault of a medical worker and on the causal link between the defect and the consequences.

Defects, as a violation of the medical care standards, can be deliberate and reckless. Careless defects and indirectly intentional defects are covered by the concept of medical error (*Nagornaya I.I.*, 2017, P. 81–90). Defects with direct intent are qualified as murders. However, poor-quality medical care can also be in an accidental causal relationship with harm, which excludes the responsibility of the medical worker who performed the care, indicates innocent infliction of harm, and irresistible force (accident).

It should be noted that at present there is no doctrinal certainty regarding the ratio of the defect in medical care and medical error; options are offered from their complete identification to the opposition. The synonymy in various languages leads to the misidentification of errors and defects (*Ushakov D. N.*, 2005, P. 146). The contrast between the error and the defect is connected with the understanding of a medical error as a conscientious delusion of a doctor caused either by an imperfection of medical science or by an atypical course of the disease, in the absence of a legally significant fault in his/her behavior (*Rykov V. A.*, 2002, P. 15-17). Medical errors and accidents in medicine are also considered as two types of defects in the provision of medical care (*Borodenko N.A., Marienkova A.V.*, 2007, P. 111–116; *Stetsenko S. G.* 2004, P. 44–47).

The indicated example from medical sciences to a certain extent echoes the existing situation on the distinction between the concepts “legal defect” and “legal error”. In the domestic jurisprudence, separate theoretical steps have already been taken in the direction of determining the ratio of these categories. The most important difference we see is the aspect that “error” primarily performs the function of reflecting the role of the conscious process in the formation and realization of law, and the concept of “defect” is intended, first of all, to emphasize the instrumental significance of various kinds of failures and deviations in the work of the legal regulation mechanism.

Partial overlapping of the volumes of these abstractions in question should not give grounds for their identification. Besides, an error itself is often only one of the reasons (or conditions) for the appearance of defects in the process of legal regulation. An error with this understanding is more related to the subjective attitude of a person to something, whereas a defect is an affiliation of unlawful behavior and its consequences (the objective side of the offence).

Defects in the regulatory framework are often the result of mistakes (misuse) of the legislator when using legal technology tools. Positive legal defectology deals not with the consciousness of the legislator, but with the consequence of erroneous behavior, that is, a defect that requires



overcoming or eliminating. However, in terms of the study of determination, the causes and conditions for the occurrence of defects, legal defectology also covers the “erroneous activity of legislators”.

From the characteristics of medical defects, we can also conclude about the close connection between defects and the medical care quality concept and the availability of negative consequences. Moreover, the consequences of defects, in general, testify to the ineffectiveness (and even anti-efficacy) of medical care, which extends from the non-optimal use of drugs and the negative assessment by the patient of care provided before the onset of serious diseases and deaths. In addition, the availability of the quality standard of care provided is of great importance for the qualification of defects in medical care; in the absence of the quality standard, it is impossible to bring a doctor to legal responsibility (*Bagmer A. M., Cherkasova L. I., 2015, P. 44–47; Pikurov N., 2018, P. 86–92*).

Note that economic science also points to the close connection between defects and efficiency. In particular, in economics, management defects are considered as causes of poor management and even causes of economic crises (*Gao Meng, 2010, P. 561-564*).

Returning to medical defects, one should pay attention to the connections between several defects in the mechanism of medical care. So, there are primary and derivative, as well as major and minor defects of medical care (*A. Ivanov, V. Ivanov, 2012, P. 52–56*). One lack of medical care can lead to another and, as a result, harm to the patient. Defect of the rule of law in the mechanism of legal regulation can also lead to defective legal relations, defective law enforcement, and drafting of defective legal documents.

Also of great importance is the belonging of a defect to a broader concept - the negative outcome of medical care (*Ponkina A.A., 2013, P. 28*). The latter can be caused by many different circumstances - from the actions of a patient himself/herself to technical malfunctions of medical

equipment as well as the ineffectiveness of legal norms implementation is caused not only by their legal and regulatory defects but also by other legal and non-legal factors and conditions.

In general terms, a defect is traditionally understood as a certain deviation from a norm or a standard. The content of the concept “defect” in many cases is revealed through an indication of the generic attribute in the form of the concept “deviation”. The latter is sometimes replaced by the synonym “change”, which, as some researchers believe, defines some objective essence of the defect, since, in their opinion, the change does not depend on the subject fixing it (*Voronin V. V.*, 2013, P. 825), but in the legal sciences, a change in the norms of law and legal acts is not associated with the category of a defect, which is mainly negatively assessed in law. The category "changes" in the law demonstrates primarily the evolution of legal regulation (*Radin, Margaret Jane*, 2017, P. 505-533).

In many branches of scientific knowledge, the indication of the inadmissibility of such a deviation, or waiver from a norm, which gives a theoretical construct a certain subjective component, is used as a specific feature of the considered definition. The subjective moment in the definition is explained by the vagueness of the criteria for distinguishing the allowable and unallowable deviations.

The ratio of the subjective and objective component in the definition of the concept “defect” differs depending on the area of science and technology it is used. For example, in crystallography, a certain type of violations in the strict periodicity of the location of particles in a crystal lattice is brought under the concept of a defect. In this case, the subject with its purposeful actions can potentially violate such a periodicity by applying external influences. However, the norm of periodicity is set objectively.

It should also be noted that the natural sciences relate the concepts of defect and deformation (*Astrova E.V., Ratnikov V.V., Remenyuk A.D., Shulpina I. L., 2002, P. 1111–1121*). A deformation (from the Latin “*Deformatio*” - distortion) is understood as the change in the characteristics and parameters of the physical body (size, shape, configuration, etc.) as a result of external or internal influence.

In the medical sciences (orthopaedics, dentistry, reconstructive surgery, etc.), deformations are considered as consequences of defects, either these categories are identified, or denoted as defects (*Guter, O.S., Mitin, N.E., Ustyugova, A. E., Sorokina M. A., 2015, P. 91–97; Selskiy N. E. 2000; Tesevich L. I., 2010; Jablonski, Rachael Y.; Osnes, Cecilie A.; Khambay, Balvinder S., 2018, P. 265-270; Rogozhina Y.; Mironovich S.; Shestak A., 2016, P. 202-206*).

In the theory of law, the correlation between defects and deformations is described only regarding legal consciousness. The term “deformation” is defined as a negative change in professional legal consciousness, which is expressed in negative attitudes of lawyers, especially law enforcement and human rights bodies, to citizens, their tolerance for offences and even in encouraging the commission of offences, and moreover in their participation in illegal activities.

Defects are inherent in the ordinary, unformed sense of justice (legal nihilism, legal idealism, and legal infantilism) (*Ya. V. Bacardiev, 2017, P. 270.*), but there is no clear criterion for distinguishing between defects and deformation of legal consciousness; sometimes deformation is considered as one of the types of defects in legal consciousness (*Pantykina M. I., 2017, P. 46; Kroz M.V.; Ratinova N.A., 2018, P. 135–149*).

Deformation is also described not only as a change of professional but also of mass justice in general (*Khudoykina T.V., Bredneva V.S., 2018, P. 86–90*), calling it “a public, social and legal phenomenon which is characterized by lack of maturity, instability or distortion of existing ideas, knowledge, ideas, attitudes and emotions about the legal system, actual legal reality, law and

order” (*Belyaeva G.S., Leshchenko O.V., 2017, P. 18–22*). In general, it can be stated that defects and deformations are described and characterized as negative phenomena in the humanities (*Gaspar Perez, Natalia; Robles Medina, Rosa Elia; Vivar Vera, Juliana, 2016, P. 192-202*).

In the natural sciences, defects and deformations are not described in a uniquely negative context. In particular, it is reported that, as an objective, all natural bodies contain numerous crystal lattice defects, micro- and macro-cracks, etc., therefore, for experiments, we use the “defect-free single crystal of a material grown under special conditions” (*Smirnov A. N., Ababkov N. V., 2014, P. 10*).

With this in mind, defects are objectively differentiated into admissible and inadmissible.

The characteristic in the form of the inadmissibility of deviation gives a negative colour to the concept of "defect"; for example, defects in legislation reduce its effectiveness and social value; in some cases, they may lead to the formation of legal nihilism, as well as cause other negative consequences. But the general scientific approach to defects and defectiveness as an inevitable, objectively conditioned phenomenon gives us an understanding of the impossibility of eliminating defects in the law. In the field of legal defectology, only the question of minimizing the risks of regulatory defects and the system of measures to prevent, overcome and eliminate them can be raised.

In general science, the presence or potential threat of negative consequences is not a mandatory sign of this category. So, on the contrary, in metallurgy defects are used purposefully to improve certain properties of metals, for example, to increase their plasticity. In jurisprudence and legal practice, it is rather difficult to imagine such cases when a defect of legal regulation would be treated as a kind of positive means. Certain unscrupulous participants in legal relations, of course, can use these or other legal defects in their interests, but this does not make them useful in general for the whole mechanism of legal regulation.

It should also be noted that defects in objects from non-legal branches of knowledge in some cases may also have a direct legal significance. For example, defects in material objects that are subjects of contracts are often grounds for legal disputes (*Bubnova M.*, 2017, P. 59–66; *Koblov A. S., Fetisova E. M.* 2012P. 75–99).

Defect statements are one of the most common written evidence in the courts. Some types of physical defects are vested with a legal form for various legal purposes (Resolution of the Government of the Russian Federation No. 1108 dated October 31, 2016 “ On Approval of Rules for Providing a Different Inter-budgetary Transfer from the Federal Budget to the Budget of Krasnodar Territory for Compensation of expenses (Reimbursement of Costs) of the Krasnodar Region budget incurred to eliminate defects of the Central Stadium in the city of Sochi” // Collected legislation of the Russian Federation. 11/07/2016. No. 45 (p. 2). Art. 6271; Order of the SCC of the Russian Federation No. 776 dated December 25, 1996 “On Approval of the Instruction on the Procedure for Completing and Making Complaints and Claims to Suppliers on Defects Identified at the Courts of Customs Authorities of the Russian Federation in Operation” // Classifier of the main types of defects in the construction and building materials industry (approved by the Main Inspectorate of the State Architecture and Building Inspection Committee of the Russian Federation on November 17, 1993) // Unpublished. SPS "Consultant Plus"; “Signs of flawed and defective rails. NTD / TsP-3-93 ” (approved by Ministry of Railways of the Russian Federation, dated March 22, 199 // Unpublished. SPS “Consultant Plus”).

## **CONCLUSIONS.**

In general, it should be noted that the analysis of general scientific approaches to defects (as negative phenomena of reality) testifies to their objectivity and inevitability in human activity, which eliminates the question of their total eradication and at the same time necessitates the development of a system of measures to reduce the risk of their occurrence. Defects have a

dialectical relationship with the categories of quality, quality standard (benchmark), performance and consequences of their occurrence. Such an interdisciplinary scientific view of defects and deficiencies should be reflected also in general legal research.

### **Results.**

A defect is an interdisciplinary category which is found in various areas of social life and is studied in various scientific areas. Theoretical-and-legal study of the category of the legal regulation defect will allow investigating the legal nature of this phenomenon, to determine their characteristic features, types, as well as ways to eliminate and overcome them.

### **Summary.**

The effectiveness of the law is influenced by both non-legal factors (political, organizational, financial, social, psychological, ideological), and some other legal deficiencies related to defects (limitations, obstacles, administrative barriers, legislative imbalance, neutralization of the law). Legal defects mutually conditioned and interacting with other legal shortcomings, have their content and their concept list reflecting certain shortcomings of the content, form and structure of legal norms and regulatory legal acts.

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